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November 29, 2010

Ms. LaDonna Castañuela  
Chief Clerk  
Texas Commission on Environmental Quality  
Bldg. F, Room 4301  
Austin, Texas 78753

**VIA HAND DELIVERY**

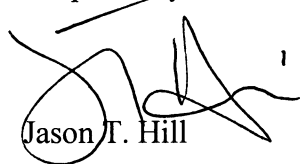
RE: TCEQ Docket No. 2009-0185-WR; SOAH Docket No. 582-10-0292  
In Re: Application No. 14-1298B by City of San Angelo for Amendment to  
Certificate of Adjudication No. 14-1298.

Dear Ms. Castañuela:

Enclosed with this correspondence, please find the City of San Angelo's reply to the exceptions submitted by the Protestants, Concho River Basin Water Conservancy Association and South Concho Irrigation Company, to the Proposal for Decision issued in the above-referenced contested case. As indicated below, a copy of this transmittal and the enclosed filing is being provided to Judge Cloninger, as well as to the persons identified on the official SOAH service list for this particular application.

Please do not hesitate to let me know if you have any questions that I can address for you regarding this matter.

Respectfully submitted,



Jason T. Hill

JTH/plh  
1227559  
ENCLOSURE

cc: The Honorable Sharon Cloninger  
Martin C. Rochelle, *of the firm*  
Tom C. Massey  
Timothy L. Brown  
*Service List*

**SOAH DOCKET NO. 582-10-0292  
TCEQ DOCKET NO. 2009-0185-WR**

<b>APPLICATION NO. 14-1298B BY CITY</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>OF SAN ANGELO FOR AMENDMENT</b>	<b>§</b>	
<b>TO</b>	<b>§</b>	<b>OF</b>
<b>CERTIFICATE OF ADJUDICATION</b>	<b>§</b>	
<b>NO. 14-1298</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**APPLICANT CITY OF SAN ANGELO’S REPLY TO  
PROTESTANT CONCHO RIVER BASIN WATER CONSERVANCY ASSOCIATION’S  
AND PROTESTANT SOUTH CONCHO IRRIGATION COMPANY’S  
JOINT EXCEPTIONS TO PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS:

The City of San Angelo (herein referenced interchangeably as either the “Applicant” or the “City”) submits this reply to the joint exceptions made to the Proposal for Decision issued in the above-referenced application (the “1298B PFD”) by the Concho River Basin Water Conservancy Association and the South Concho Irrigation Company (the “Protestants”) and would respectfully show the Commissioners of the Texas Commission on Environmental Quality the following:

**I.**

On November 18, 2010, Protestants submitted multiple exceptions to the 1298B PFD and proposed order issued by the Honorable Sharon Cloninger in the above-styled and numbered contested case. As an initial matter, it is noteworthy that none of Protestants’ exceptions, if granted, would have any material impact on the ultimate conclusions reached by Judge Cloninger in the 1298B PFD, nor would they be a basis for altering the Judge’s recommendation to grant the above-referenced application and issue the certificate in substantially similar form to what has been proposed by the Judge in her findings. It is particularly noteworthy that Protestants

have taken no exception to the Judge's legal conclusion number ("Conclusion No.") 18—concluding that the City has demonstrated the above-referenced application satisfied each applicable statutory and regulatory requirement. However, the evidence contained in the record does not support the requests made by the Protestants in their exceptions in all instances. The City responds to each of Protestants' exceptions as follows:

Protestants' Exception to Finding of Fact No. 4

Protestants have excepted to finding of fact number ("Finding No.") 4 and have requested that the following change be made in response to their exception:

COA 14-1298 describes DP 1 as a point on the north bank of the South Concho River on the perimeter of a fifty (50) acre-foot capacity reservoir located S 85° E, 855 feet from the northwest corner of the J. Zerbach Survey 1827, Abstract 4217, near Christoval, Texas, that is also authorized by [~~COA 14-1280 through 14-1297, 14-1299 through 14-1303, 14-1314, 14-1403, and 14-1404~~] approximately 35 water rights holders, as shown by the records of the Commission as of the filing date of this amendment, July 7, 2006.

As part of their request, Protestants argue that the record reflects there exists a total of 35 individuals with water rights that authorize them to make beneficial use of water that has been diverted into the off-channel canal through the Diversion Point 1 ("DP 1") described in the Certificate of Adjudication No. ("COA") 14-1298 (the "Canal"). They point in the record to CONCHO 1298B PFT Exhibit 1-A for evidence that purportedly supports their argument.

While the precise number of persons who are authorized today to make use of water that has been lawfully diverted into the Canal through DP 1 is not entirely clear in the record, the Protestants have misunderstood the import of Finding No. 4 in the context of their stated concern. Finding No. 4 is an articulation of the underlying fact that COA 14-1298, *as the certificate exists today*, describes DP 1 as a point on the north bank of the South Concho River on the perimeter of a fifty (50) acre-foot capacity reservoir located S 85° E, 855 feet from the

northwest corner of the J. Zerbach Survey 1827, Abstract 4217, near Christoval, Texas, that is also authorized by COA 14-1280 through 14-1297, 14-1299 through 14-1303, 14-1314, 14-1403, and 14-1404.<sup>1</sup> The finding is nothing more than a recognition of the language used in the existing certificate. The language suggested by Protestants in their exception to Finding No. 4 appears nowhere within COA 14-1298,<sup>2</sup> nor in the amendment made to COA 14-1298 in 2004.<sup>3</sup> In fact, the changes proposed by Protestants in their exception to Finding No. 4 are without any evidentiary support whatsoever. Accordingly, the City respectfully requests that no change be made to Finding No. 4 in response to Protestants' exception, and that Protestants' request otherwise be denied.

#### Protestants' Exception to Finding of Fact No. 14

The Protestants have excepted to Finding No. 14 and have requested that the following revision be made in response to their exception:

The City shares its maximum diversion rate of 15.11 cfs with the other [20-30] approximately 35 individual water rights owners that are also authorized to use water from the Canal diverted from DP 1.

The Protestants' point again to CONCHO 1298B PFT Exhibit 1-A as purported evidence to support their requested change to Finding No. 14. As described by the testimony of its sponsoring witness,<sup>4</sup> CONCHO 1298B PFT Exhibit 1-A contains a list of names of individuals that are held out as "members" of the South Concho Irrigation Company.<sup>5</sup> The exhibit identifies several persons by name and lists various numbers under columns labeled "Account #". In their

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<sup>1</sup> SA 1298B Exhibit 3, ¶ 3.A.(1).

<sup>2</sup> See SA 1298B Exhibit 3.

<sup>3</sup> See SA 1298B Exhibit 4.

<sup>4</sup> CONCHO 1298B PFT Exhibit 1 at 2:22-31.

<sup>5</sup> CONCHO 1298B PFT Exhibit 1-A.

exceptions, Protestants assert that the information listed under the columns labeled “Account #” are in fact numbers referencing certificates of adjudication issued by the TCEQ or its predecessor agencies,<sup>6</sup> though there is no evidence in the record that unambiguously correlates the information provided under the “Account #” columns with certificates of adjudication.

However, in testimony provided during his direct examination, Dr. Robert Brandes indicates that both the information contained in COA 14-1298, as well as information included within the TCEQ’s water availability model for the Colorado River Basin, show that a total of 26 water rights contain an authorization to make use of water that has been lawfully diverted into the Canal through DP 1.<sup>7</sup> Later during cross examination, Dr. Brandes consistently testifies that he recalls the number of such authorizations being “between 20 and 30, somewhere in that range.”<sup>8</sup> Indeed, if the numbers listed in CONCHO 1298B PFT Exhibit 1-A under the columns labeled “Account #” are to be considered references to certificates of adjudication, there appears to be approximately 26 distinct certificates referenced in the exhibit. This would indicate that in some instances a single underlying certificate of adjudication is being relied upon by more than one appropriator.

While CONCHO 1298B PFT Exhibit 1-A contains a total of 35 entries that purportedly reflect the current “membership” of the South Concho Irrigation Company as of the time of the evidentiary hearing, the record makes clear that the South Concho Irrigation Company member rolls change “from time to time as ownership of the land and water rights change.”<sup>9</sup> Protestants

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<sup>6</sup> See Protestants’ Exceptions to Proposal for Decision at 4.

<sup>7</sup> SA 1298B Exhibit 2 at 14:8-12.

<sup>8</sup> Transcript of Hearing on the Merits of SOAH Docket No. 582-10-0292, TCEQ Docket No. 2009-0185-WR, *Application No. 14-1298B by City of San Angelo for Amendment to Certificate of Adjudication No. 14-1298*, before the State Office of Administrative Hearings, June 30, 2010 – July 1, 2010 at 67:21 – 68:3.

<sup>9</sup> CONCHO 1298B PFT Exhibit 1 at 2:22-24.

therefore assert that the membership number purportedly reflected in CONCHO 1298B PFT Exhibit 1-A is current as of the evidentiary hearing, but they also concede that the number is a dynamic one. It would seem, then, that if the changes requested by the Protestants to Finding No. 14 are to be considered, their request be accommodated by making one of the following revisions:

The City currently shares its maximum diversion rate of 15.11 cfs with the other [20-30] approximately 35 individual water rights owners that are also authorized to use water from the Canal diverted from DP 1.

-- or --

The City shares its maximum diversion rate of 15.11 cfs with [the] other [20-30] individual water rights owners that are also authorized to use water from the Canal diverted from DP 1.

Because of the ambiguities of Protestants' evidence on this issue, the City would not object to so revising Finding No. 14 if either of these modifications are made to the changes proposed by Protestants.

Protestants' Exception to Finding of Fact No. 100.2.C.

The Protestants have excepted to Finding No. 100.2.C. and have requested that the following revision be made in response to their exception:

For the 128.1 acre-feet of water per year authorized at a priority date of July 29, 1914, the maximum diversion rate at Diversion Point 4 is 15.11 cfs in combination with other owners of Diversion Point 1 (Owners of Certificates of Adjudication [~~Nos. 14-1280 through 14-1297, 14-1299 through 14-1303, 14-1314, 14-1403, and 14-1404~~] as they existed on the filing date of this amendment, July 7, 2006). For the 124 acre-feet of water per year authorized at a priority date of October 8, 1931, the maximum diversion rate at Diversion Point 4 is 3.67 cfs.

The City has no objection to the modifications proposed by Protestants to Finding No. 100.2.C.

## **II.**

The Protestants spend several pages in their joint exceptions discussing background issues associated with their ultimate requests, but it does not appear that the Protestants have excepted to any findings of fact other than the three findings referenced and addressed above. Likewise, it does not appear that Protestants have excepted to any of the conclusions of law made by Judge Cloninger in the proposed order issued with the 1298B PFD. The City is similarly unaware of any exceptions made by OPIC or the TCEQ Executive Director regarding the 1298B PFD or the associated proposed order.

## **III.**

Based on the foregoing, and on the overwhelming weight of evidence admitted into the record during the contested case hearing on the above-referenced application, the City respectfully requests that the Commissioners:

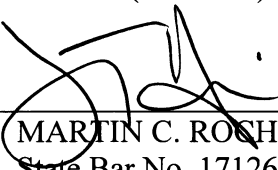
- (1) make no changes to the 1298B PFD or to the proposed order associated with same in response to Protestants' exception to Finding No. 4, and otherwise deny Protestants' request for such revisions;
- (2) make no changes to the 1298B PFD or to the proposed order associated with same in response to Protestants' exception to Finding No. 14, or, alternatively, revise Finding No. 14 in the manner proposed by the City herein above;
- (3) grant Protestants' request for modification of Finding No. 100.2.C. if the Commissioners conclude that such a modification to the 1298B PFD and proposed order is necessary; and
- (4) otherwise approve the above-referenced application and issue the amended certificate of adjudication proposed by the ED, as modified by Judge Cloninger in the 1298B PFD.

Respectfully submitted,

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**ATTORNEYS FOR APPLICANT  
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing submittal was delivered by hand delivery, facsimile, or by email to the persons listed in the attached SOAH service list on this, the 29th day of November, 2010.



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JASON T. HILL

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**STYLE/CASE:** CITY OF SAN ANGELO

**SOAH DOCKET NUMBER:** 582-10-0292

**REFERRING AGENCY CASE:** 2009-0185-WR

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**STATE OFFICE OF ADMINISTRATIVE**

**ADMINISTRATIVE LAW JUDGE**

**HEARINGS**

**ALJ SHARON CLONINGER**

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**REPRESENTATIVE / ADDRESS**

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SOUTH CONCHO IRRIGATION COMPANY

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